

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00717-COA

KGC PROPERTIES INC.

APPELLANT

v.

TRIANGLE MAINTENANCE SERVICES LLC

APPELLEE

DATE OF JUDGMENT: 04/18/2011
TRIAL JUDGE: HON. GLENN ALDERSON
COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT: J. HALE FREELAND
NATHAN L. BARRETT
ATTORNEYS FOR APPELLEE: WILLIAM THOMAS COOPER
KRISTEN WOOD WILLIAMS
NATURE OF THE CASE: CIVIL - CONTRACT
TRIAL COURT DISPOSITION: AWARDED DAMAGES AND ATTORNEY'S FEES TO APPELLEE
DISPOSITION: AFFIRMED - 12/04/2012
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE LEE, C.J., MAXWELL AND RUSSELL, JJ.

LEE, C.J., FOR THE COURT:

¶1. Triangle Maintenance Services LLC (Triangle) filed a stop-payment notice requesting KGC Properties Inc. to pay \$35,601.93. KGC refused to pay. Triangle sued KGC, and the Lafayette County Chancery Court granted a judgment in favor of Triangle for \$20,654.11, which included \$5,588.23 in attorney's fees. KGC now appeals, arguing: (1) it did not owe Oxford Dozer Company (ODC) at the time Triangle filed its stop-payment notice, and therefore, the stop-payment notice did not "attach;" and (2) Triangle was not entitled to

attorney's fees.

FACTS AND PROCEDURAL HISTORY

¶2. KGC contracted with ODC to construct a development near Oxford, Mississippi. ODC, in turn, subcontracted with Triangle to perform curb and gutter work for the development. After performing the work, Triangle sent an invoice to ODC for \$35,601.93. On October 22, 2008, KGC paid ODC \$43,382.70. Claude Neal, owner of ODC, signed an affidavit of release of liens; however, Triangle was never paid for the work it performed.

¶3. After the October 22, 2008 payment, ODC abandoned the project. Days later, Total Lawn Care sent a stop-payment notice to KGC. KGC quickly received two additional stop-payment notices – one from Williams Equipment and Supply and the other from CMC Ready Mix. KGC notified ODC of the stop-payment notices. ODC responded, informing KGC it could not complete the job and suggesting that KGC contract with Mark Cox because he was the only contractor Neal had contacted who would “finish the job for the amount of money that is left on the contract.” Instead, KGC paid another contractor \$52,190.10 to complete the job.

¶4. On January 19, 2009, Triangle sent a demand letter to ODC, but ODC never responded. Later that month KGC received another stop-payment notice from Sparks Auto Parts for \$13,385.85. And on February 2, 2009, Triangle filed a stop-payment notice for \$35,601.93. KGC paid three of the five stop-payment notices – those from Total Lawn Care, Williams Equipment and Supply, and CMC Ready Mix.

¶5. Triangle sued KGC seeking payment as a subcontractor under Mississippi Code Annotated section 85-7-181 (Rev. 2011). Ruling in favor of Triangle, the chancery court

stated that KGC should have paid the stop-payment notices in proportion to the amount of claims received, up to the remaining \$32,000 left on the contract. Because Triangle 's claims were 41.92% of the claims submitted under stop-payment notices, Triangle was entitled to 41.92% of the \$35,939.60 total for stop-notice claims or \$15,065.88, as well as \$5,588.23 in attorney's fees. This appeal followed.

STANDARD OF REVIEW

¶6. A chancellor's findings will not be disturbed "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong [or] clearly erroneous[,] or [applied] an erroneous legal standard[.]" *Sanderson v. Sanderson*, 824 So. 2d 623, 625-26 (¶8) (Miss. 2002) (citations omitted). Additionally, "it is not the job of [the appellate court] to redetermine questions of fact resolved by the chancellor." *Stockstill v. Gammill*, 943 So. 2d 35, 40 (¶8) (Miss. 2006).

¶7. A chancellor's "interpretation and application of the law is reviewed under a de novo standard." *In re Guardianship of Savell*, 876 So. 2d 308, 312 (¶4) (Miss. 2004).

ANALYSIS

¶8. Under section 85-7-181, a subcontractor can file a stop-payment notice and request the owner to pay the subcontractor directly rather than paying the amount to the contractor. For a subcontractor to reap the benefits of section 85-7-181, he must "giv[e] actual notice prior to the time the owner pays the prime contractor." *Amerihost Dev., Inc. v. Bromanco, Inc.*, 786 So. 2d 362, 365 (¶12) (Miss. 2001). Therefore, the requirements of section 85-7-181 are two-fold: (1) the subcontractor must give actual notice, and (2) the owner must owe the prime contractor at the time the subcontractor gives the notice. If there are insufficient

funds to pay all of the stop-payment notices, the owner should prorate its payments in proportion to the amount of the total claims received. Miss. Code Ann. § 85-7-181.

¶9. Neither party raised an issue with the actual notice; therefore, the question before this Court is if KGC owed ODC on February 2, 2009, when Triangle filed its stop-payment notice.

I. REMAINING AMOUNT ON THE CONTRACT

¶10. KGC contends that it did not owe ODC at the time Triangle filed its stop-payment notice, and because of that, Triangle's stop-payment notice could not have "attached." KGC argues that the chancery court misinterpreted and misapplied the law, which on appeal warrants a de novo review. *Tucker v. Prisock*, 791 So. 2d 190, 192 (¶10) (Miss. 2001). This contention is incorrect. The chancery court made a finding of fact that KGC still owed ODC under the contract at the time Triangle filed its stop-payment notice, stating specifically that "there is no question in the [c]ourt's mind that at least \$32,000.00 was owed on the contract" That finding triggered the application of section 85-7-181. Because this issue is based on a finding of fact and not a misapplication of the law, the Court will only reverse the decision if the chancellor was manifestly wrong or clearly erroneous or applied an incorrect legal standard. *Miller v. Pannell*, 815 So. 2d 1117, 1119 (¶9) (Miss. 2002) (citations omitted).

¶11. On November 21, 2008, KGC's president, Kenny Coleman, sent a letter to Claude Neal, owner of ODC. In the letter Coleman advises Neal that KGC had received three stop-payment notices, one each from Total Lawn Care, Williams Equipment and Supply, and CMC Ready Mix. Coleman also stated that KGC removed \$57,000 from the \$89,000

remaining as ODC's final draw, leaving "\$32,000 to cover the 3 debts above [the stop-payment notices]." Also, Coleman apprised Neal that KGC would be issuing dual-payee checks in the order the stop-payment notices were received up to the \$32,000 maximum.

¶12. On March 12, 2009, Coleman sent a letter to all five companies – Total Lawn Care, Williams Equipment and Supply, CMC Ready Mix, Triangle, and Sparks Auto Parts – that had served KGC with stop-payment notices. Coleman wrote that "\$32,000 was all that was left to draw at the time Mr. Neal stopped doing his work" He also informed three of the five companies that KGC would be issuing dual-payee checks in the amounts requested. Coleman notified the creditors that he would not be paying any further stop-payment notices, as he was only paying them "because [he] believe[d] . . . there would be funds left over when the job was completed." And on March 12, 2009, KGC issued the dual-payee checks for the first three stop-payment notices.

¶13. Clearly from the language in the November 21, 2008 letter and KGC's payments made with dual-payee checks, KGC owed ODC \$32,000 on November 21, 2008. Additionally, Coleman made no payments to ODC or any of the three subcontractors prior to Triangle's filing of its stop-payment notice. Therefore, KGC still owed on the contract at the time that Triangle filed its stop-payment notice on February 2, 2009.

¶14. The chancery court was not manifestly wrong in finding that KGC still owed ODC at least \$32,000 when Triangle filed its stop-payment notice. The chancellor properly applied section 85-7-181. Therefore, we find this issue is without merit.

II. ATTORNEY'S FEES

¶15. Section 85-7-181 specifically states, “[T]he court . . . shall give judgment and award costs, and reasonable attorney’s fees, according to the rights of the several parties in accordance herewith.” KGC argues that since Triangle’s stop-payment notice did not “attach,” it is not entitled to attorney’s fees under section 85-7-181. As stated earlier, KGC owed \$32,000 on its contract with ODC when Triangle filed its stop-payment notice. Under the plain language of section 85-7-181, Triangle is entitled to attorney’s fees and costs.

¶16. The chancellor did not abuse his discretion when he awarded Triangle \$5,588.23 in attorney’s fees and expenses. Therefore, we affirm.

¶17. THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

IRVING, P.J., ISHEE, ROBERTS, CARLTON, MAXWELL, RUSSELL AND FAIR, JJ., CONCUR. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, J.

GRIFFIS, P.J., DISSENTING:

¶18. The majority correctly presents the question to be decided. Did KGC owe ODC any money on February 2, 2009, when Triangle served its stop-payment notice? The chancellor found that KGC did owe money to ODC, and the majority agreed. I disagree. I find that there is no evidence to support the finding that KGC owed ODC any amount of money on February 2, 2009. Therefore, under Mississippi Code Annotated section 85-7-181 (Rev. 2011), Triangle was not entitled to recover from KGC. I respectfully disagree with the majority and dissent. I would reverse and render the chancellor’s judgment.

¶19. Section 85-7-181,¹ titled “Amount due contractor . . . may be bound by written notice; suit,” in relevant part provides:

When any contractor . . . shall not pay any person who may have furnished materials, labor or rental or lease equipment used in the erection, construction, alteration, or repair of any house, building, structure, [or] fixture . . . the amount due by him to any subcontractor therein, . . . rental or lease equipment supplier or laborer employed by him therein, any such person, subcontractor, journeyman, laborer or rental or lease equipment supplier may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor . . . shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor, journeyman, rental or lease equipment supplier or laborer who might lawfully have given notice in writing to the owner hereunder, and if after such notice, the contractor . . . shall bring suit against the owner, the latter may pay into court[] the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workman and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen, rental or lease equipment suppliers or materialmen, so far as known, parties to the suit (and any such party not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be liable for costs; but if the owner, when sued, with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs, and reasonable attorney's fees, according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment

¹A Mississippi federal court recently held this statute unconstitutional. *Noatex Corp. v. King Constr. of Houston, LLC*, Nos. 3:11cv00137-SAA, 3:11cv00152-SAA, 1:11cv00251-SAA, 2012 WL 1991922, at *10 (N.D. Miss. Apr. 12, 2012).

shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

¶20. The chancellor concluded that KGC owed \$32,000 to ODC, and the chancellor determined Triangle was entitled to recover \$15,065.88 and attorney's fees in the amount of \$5,588.23 under section 85-7-181. The chancellor identified two letters that supported the decision.

¶21. First, in a letter dated November 21, 2008, KGC attempted to get ODC to complete its work under the contract. KGC acknowledged it had received three stop-payment notices, from Total Lawn Care, Williams Equipment and Supply, and CMC Ready Mix. The letter also said that KGC intended to make dual-payee checks to these companies, up to \$32,000. KGC said that it would pay the stop-payment notices in the order they were received.

¶22. Second, in a letter dated March 12, 2009, KGC said that the cost to complete the job was \$52,190.10, and there was only \$32,000 "left to draw" at the time ODC stopped work. The letter said that KGC intended to write checks to the following entities in the following amounts: (1) Total Lawn Care and Claude Neal/ODC for \$4,726.26, (2) Williams Equipment and Supply and Claude Neal/ODC for \$7,379, and (3) CMC Ready Mix for \$23,834.25. More importantly, the letter stated that KGC had paid beyond its contractual obligation and only paid these companies for work performed because KGC had led them to believe funds would be left over when the job was completed.

¶23. This Court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Hamilton v. Hopkins*, 834 So. 2d 695, 699

(¶12) (Miss. 2003). Here, the chancellor clearly erred when he determined KGC owed ODC \$32,000 on the contract.

¶24. There is no evidence in the record to establish that KGC owed, on September 2, 2009, any further sum to ODC. In fact, the opposite is true. The record established that KGC had paid all sums owed ODC on October 22, 2008. After that payment, ODC stopped work and abandoned the project. As a result, ODC abandoned its right to future payments under the contract.

¶25. As of ODC's abandonment of the project, it is correct to say that the total sum owed under the contract less the amounts paid to ODC left an balance of \$32,000. However, this balance was to be used to finish the contract.

¶26. ODC did not finish the contract. Therefore, the balance of \$32,000 was not owed to ODC. Instead, KGC had the right to use the balance to finish the contract. The evidence cited by the chancellor did not prove that KGC owed any sum to ODC. Instead, at best, it established that KGC gratuitously paid ODC's creditors.

¶27. This case is similar to *Williams v. Taylor*, 216 Miss. 563, 62 So. 2d 883 (1953). In *Williams*, the owner of a subdivision project hired a contractor to build houses. *Id.* at 566, 62 So. 2d at 884. The contractor began work but later abandoned the job. *Id.* at 567-68, 62 So. 2d at 884. The owner found another contractor to finish the job. *Id.* at 568, 62 So. 2d at 884. Subcontractors filed stop notices with the owner. *Id.* The Mississippi Supreme Court found that the owner owed the main contractor nothing. *Id.* at 569, 62 So. 2d at 885.

¶28. Like in *Williams*, on February 2, 2009, KGC did not owe ODC any additional sum. ODC abandoned the project and forfeited its right to the remainder of the contract. The \$32,000 balance was not owed to ODC because it was not earned.

¶29. When KGC issued dual-payee checks to other companies, KGC did not admit that it owed any amount to ODC. ODC had filed a materialman/construction lien against KGC. KGC's president, Kenny Coleman, testified that he made the checks payable to the various entities because at the time he was not sure about the outcome of the lien action. Thus, Coleman testified that the dual-payee checks were a proactive step and not an admission that KGC owed ODC.

¶30. Because KGC did not owe ODC, Triangle is not entitled to any relief under the stop-payment-notice statute. Therefore, I would reverse and render the decision of the Lafayette County Chancery Court.

BARNES, J., JOINS THIS OPINION.